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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ELMER BANAAG et al.,

Plaintiffs and Appellants,

v.

CASE SYSTEMS, INC.,

Defendant and Respondent.

A136841

(Alameda County  
Super. Ct. Nos. FG11564614 &  
FG11566921)

Plaintiffs Elmer Banaag and Thomas Armendariz appeal from the judgment in favor of defendant Case Systems, Inc. (Case). Plaintiffs had filed lawsuits claiming they were not paid the correct prevailing wages for their work on a long-term public works project for which Case was the contractor. After a bench trial, the trial court ruled in favor of Case. We affirm.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

***I. Factual Background***

On November 1, 1999, a 10-year contract (MTC contract) was entered into between Comarco Wireless Technologies (Comarco) and the Metropolitan Transportation Commission (MTC) requiring prevailing wages to be paid for highway call box installation work. Paragraph four of the contract provides: “CONTRACTOR shall comply with applicable sections of the California Labor Code (e.g., Sections 1720 *et seq.* and Title 8 of the California Code of Regulations Sections 16000 *et seq.*) governing the payment of prevailing wages, as determined by the Director of the California Department

of Industrial Relations, in regards to the installation work performed under this Agreement. In particular, CONTRACTOR's attention is drawn to Labor Code Sections 1771 (payment of prevailing wage rate), 1775 (penalty for non-payment), and 1777.5 (use of apprentices)."

Comarco paid its employees working on call box installation and maintenance, including plaintiffs, prevailing wages for all work pursuant to an applicable general prevailing wage determination made by the director of the California Department of Industrial Relations (DIR) for "telephone installation workers." This DIR determination was issued May 22, 1992 and remained in effect, unchanged, until February 22, 2000 at which time only the holiday pay was changed. The determination was a "single asterisk" determination, meaning that the rates listed apply for the entire duration of the project pursuant to California Code of Regulations, title 8, section 16204, subdivision (b) (section 16204(b)).<sup>1</sup>

In 2008, Case acquired certain assets of Comarco, including the MTC contract at issue in the present lawsuit. Case continued to pay plaintiffs using the hourly wage as stated in the February 22, 2000 DIR determination.

On March 8, 2011, Banaag filed a complaint against Case under Business and Professions Code section 17200 based on alleged violations of statutes and regulations pertaining to meal and rest periods, as well as failure to pay prevailing wages. At some point thereafter, Armendariz filed a similar complaint.

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<sup>1</sup> Section 16204, subdivision (b) states, in part: "Prevailing wage determinations with a single asterisk (\*) after the expiration date which are in effect on the date of advertisement for bids remain in effect for the life of the project. Prevailing wage determinations with double asterisks (\*\*) after the expiration date indicate that the basic hourly wage rate, overtime and holiday pay rates, and employer payments to be paid for work performed after this date have been predetermined. If work is to extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. The contractor should contact the Prevailing Wage Unit, DLSR, or the awarding body to obtain predetermined wage changes. All determinations that do not have double asterisks (\*\*) after the expiration date remain in effect for the life of the project."

On April 11, 2011, the trial court consolidated the two cases.

On April 5, 2012, the trial court determined as a pretrial matter that the MTC contract was a public works contract and that it required the payment of the prevailing wage. The matter proceeded as a court trial. The sole substantive issue at trial was whether plaintiffs were paid the proper prevailing wage.

## ***II. Trial***

### ***A. Plaintiffs' Evidence***

#### ***1. Plaintiffs' Testimony***

Banaag was employed by Case as a phone installer commencing in July 2008. Before then, he had worked for Comarco since 1998. His job was to service and maintain highway call boxes.

When Banaag asked his supervisor at Case whether he was being paid the correct prevailing wage, he was told the rate of pay was correct. Every six months he would get a raise according to the steps set forth in the prevailing wage document. The maximum rate was \$21.55 per hour. He was already receiving more than the maximum rate when Case took over the Comarco contract.

Armendariz began working for Case in 2008 as a call box technician. Prior to that he also had worked for Comarco. He was hired by Comarco in 2001 and was paid \$21.55 per hour. He also had questioned whether Case was paying him the correct wage.

#### ***2. Ramil Noche***

Ramil Noche, a research analyst for the DIR's Division of Labor Statistics and Research, testified that a "single asterisk determination" as to a job classification means the prevailing wage determination is valid for the life of an individual public works project. If a prospective job classification determination within a project is one that has not already been published by the DIR, an awarding agency can request a "special determination" 45 days before the project is advertised. Noche testified that the DIR had not made any special determinations with respect to the MTC Contract. He also stated

that if a single asterisk designation applies to a contract, this designation will become ineffective if the contract is subsequently amended.

Noche testified that on August 22, 2001, the DIR issued an updated wage rate under a classification for “telecommunications technicians.” The wage determination for this classification that is currently in effect in the Bay Area is dated August 22, 2003.<sup>2</sup> This determination could have been applied to telephone communications workers who worked on call boxes in the nine Bay Area counties from 2008 to 2010; he did not know whether this determination applied to the MTC contract.

On April 30, 2012, Noche responded on behalf of the DIR to a request from Case for a rate-of-pay determination for call box system installation workers. Noche determined that several job classifications could potentially perform this type of work. From the perspective of his agency, workers who worked on the MTC contract in 2008, 2009, and 2010 should have been paid pursuant to the August 2003 “telecommunications technician” classification. If Case had come to his agency during these years and asked what the correct prevailing wage classification and pay scale for the work being done by its call box workers under that contract was, they would have been told to use the August 2003 determination.

On cross-examination, Noche stated again that the “telecommunications technician” general prevailing wage determination was first issued in August 2001. It was not in effect in 1999. The “telephone installation worker” general prevailing wage determination made on May 22, 1992 would have been used for a contract entered into in November 1999. This “telephone installation worker” classification determination was superseded by the classification of “telecommunications technician” in August 2001. Noche testified that the earlier “telephone installation worker” determination could have been relied on in 1999 because it has a single asterisk and was therefore valid for the life

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<sup>2</sup> The basic hourly rate under this determination ranges from \$27.18 to \$28.50, depending on the county.

of the project. Hypothetically, if a 10-year contract was entered into in November 1999 and there had been no material changes made to that contract since that time, then the correct wage rate for the period between 2008 and 2010 would have remained at the 1992 rate. When a general prevailing wage determination is superseded, the new determination does not invalidate prior prevailing wage determinations that have been designated with the single asterisk. This is because single asterisk determinations apply for the life of the project.

## ***B. Case's Evidence***

### ***1. Stefanie Pow***

Stefanie Pow is employed by the MTC. Beginning in 2006, she was the call box project manager who oversaw the MTC contract. She never declared Comarco or Case to be in default under Paragraph four of that agreement. As part of her job, she would speak with the contractor to make sure the work was being done, that they were submitting invoices correctly, and that they submitted work orders with the invoices. Neither Comarco nor Case ever supplied her with certified payroll records.

### ***2. Sebastian Gutierrez***

Sebastian Gutierrez, the President and CEO of Case, testified that he was working for Comarco when it acquired the MTC contract. Comarco hired all of the prior contractor's employees and learned they had been paid the prevailing wage for "telephone installation workers." Comarco continued to pay these workers under the same prevailing wage determination that the former contractor had used.

Gutierrez was also the primary Comarco contact person when the 1999 MTC contract was negotiated. He testified that he and his contact at the MTC discussed using the then-current prevailing wage determination for the "telephone installation worker" classification when he negotiated that contract. He was not concerned about the total amount of wages that the workers were going to be paid over the 10-year contract because the relevant prevailing wage determination indicated that it would be good for

the duration of the project. The scope of work performed under the MTC contract did not change during the life of the contract.

Case was formed in April 2008 to acquire the Comarco call box business assets. Case began performing work as the assignee of the MTC contract on July 1, 2008, and continued that work until the contract terminated on June 30, 2010. Case had hired all of the Comarco field employees, including plaintiffs, and paid them under the same prevailing wage rate used by Comarco, plus vacation, health benefits, sick leave, and 401(k) benefits.

### ***III. Trial Court's Decision***

On August 24, 2012, the trial court issued its judgment in favor of Case. In its accompanying statement of decision, the court concluded Case had properly paid its employees “pursuant to an applicable General Prevailing Wage Determination C-422-X-1-92-1 made by the Director of the California Department of Industrial Relations . . . .” This determination contained single asterisk designation after its April 1, 2000 expiration date. Under section 16204(b), the determination was therefore valid for the life of the project, and plaintiffs had failed to introduce “any competent evidence overcoming the legal effect of the single asterisk notation . . . .” This appeal followed.

## **DISCUSSION**

### ***I. Standard of Review***

Our review presumes a judgment is correct. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632.) We apply the substantial evidence standard of review to an appeal of a judgment after trial. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) The appellant has the burden to demonstrate prejudicial error based on an adequate record and appropriate legal argument. (Code Civ. Proc., § 475; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

## ***II. Prevailing Wage Law***

In California, publicly financed construction projects are governed by the prevailing wage law. (Lab. Code, §§ 90.5, 1720-1861; see *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985-988.) With certain exceptions, a contractor on a public works project must pay workers “not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed . . . .” (Lab. Code, § 1771.) The DIR is responsible for determining the prevailing wage for each “craft, classification, or type of worker.” (Lab. Code, § 1773; Cal. Code Regs., tit. 8, § 16200; *Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1466-1467.) The Director’s determination of the prevailing wage is to be based on consideration of wage rates set by collective bargaining agreements and for federal public works in the same area, unless those rates do not “constitute the rates actually prevailing in the locality,” in which case the Director is to “obtain and consider” other data from labor organizations, employers, and employer associations. (Lab. Code, § 1773.) The DIR does not personally give the awarding body the general prevailing wage rate. Instead, it publishes general prevailing wage determinations so that all interested parties can determine the proper rate. (Cal. Code Regs., tit. 8, § 16201.)<sup>3</sup>

The Division of Labor Standards Enforcement’s Public Works Manual, section 3.4.6 states: “If there are no ‘predetermined’ changes, the expiration date on each prevailing wage determination will be followed by a single (\*) asterisk. Single asterisk expiration dates mean the rates listed on that particular wage determination apply for the

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<sup>3</sup> Section 16201 provides, in part: “When the Director determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the Director shall issue a determination enumerated county by county, but covering the entire area. Such determinations will ordinarily be made for an entire county or group of counties and shall constitute the Director’s determination for all localities in which public work is performed within that county or counties except as the geographic application of the determination may be specifically limited by the determination itself.”

entire duration of the project, no matter how long work under the original public works contract continues.”

It is uncontroverted that the general prevailing wage determination for the craft of “telephone installation worker” for the counties relevant to the present lawsuit was issued on February 22, 2000. The expiration date of this determination includes a single asterisk: “April 1, 2000\* Effective until superseded by a new determination issued by the Director of Industrial Relations.” The regulation sets forth 11 steps of pay increases, with the time interval between each step set at six months, ending in a total hourly rate of \$21.55.

### ***III. Contentions on Appeal***

At trial, plaintiffs contended the “telecommunications technician” classification should have been used to determine their wages. On appeal, they assert Case contended at trial that it had obtained a variance known as a “special determination,” which “excused the need to pay the current Prevailing Wage, permitting it to pay less than the then current Prevailing Wage.” In support of this characterization, they cite to Case’s opening statement at trial. Plaintiffs claim no evidence was offered at trial to show that a special determination had issued such that would exempt Case from having to pay a higher prevailing wage rate.

The portion of the reporter’s transcript cited to by plaintiffs indicates Case never contended that it had obtained a special determination. In fact, its counsel argued the exact opposite: “Probably the first issue that [plaintiffs’ counsel] is wrong on is the special determination. [He] said that you have to go to the DIR to get a special determination for the project and then the single asterisk is applicable.” Case’s counsel then stated his client’s position: “So the special determination, as Mr. Noche will testify to, is where there is no appropriate general prevailing wage determination in existence which applies to the work being done on the project, the awarding body can – the awarding body, or, indeed, any other interested party, whether it be a union, whether it be



a contractor, whether it be a member of the public, has the ability to go to the DIR and ask for a special determination as to what rate should be used for this particular project. *But there was no need to do so here because there was an appropriate classification: The telephone installation worker classification.*” Thus, the entire premise of plaintiffs’ appeal is erroneous.

Labor Code section 1773 provides, in part: “The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract from the Director of Industrial Relations.” Here, it is undisputed that no special determination was made or even sought by any of the contracting parties. Instead, the “telephone installation worker” general prevailing wage determination was utilized. This determination was already in place when Case acquired the MTC contract in 2008. It is also undisputed that this wage determination is a “single asterisk” determination which, under section 16204(b), remained in effect for the life of the project including the period during which plaintiffs were employed by Case.

Plaintiffs next assert that the trial court erred in excluding the testimony of Jeff Ash. Ash was identified as having served as the CFO of Republic ITS at a time when that company was seeking to purchase the call box division from Comarco. At trial, plaintiffs sought to offer Ash’s opinion that Comarco had not been paying prevailing wages as determined by the DIR under the August 2003 determination, which failure, in his view, represented a “trailing contingent liability.” Plaintiffs’ counsel stated that the testimony was relevant to the issue of exemplary damages, as it would tend to show Case was on notice that plaintiffs were not being paid pursuant to the correct wage determination. The trial court concluded plaintiffs were merely seeking to offer opinion

evidence on the ultimate legal issue of whether plaintiffs should have been paid under the 2003 determination, and that the proffered testimony was therefore irrelevant.

A trial court’s discretionary decision to admit or exclude evidence “ ‘ “will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” ’ ” (*People v. Geier* (2007) 41 Cal.4th 555, 585; *People v. Brown* (2003) 31 Cal.4th 518, 534.) The court here was tasked with the legal question of whether Case had failed to pay according to the proper rate, and Ash’s opinion based on his own research would not have contributed materially to the facts upon which the court had to rely to make its ruling. We find no abuse of discretion.

#### **DISPOSITION**

The judgment is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P.J.

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Banke, J.